
The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future

Richard M. Frank*

TABLE OF CONTENTS

I. THE ROAD TO THE PRESENT.....	667
II. ASSESSING PUBLIC TRUST DEVELOPMENTS OVER THE PAST	
THREE DECADES.....	671
A. <i>What Natural Resources are Subject to the Public Trust?...</i>	671
1. Inland Navigable Waterways.....	671
2. Public Access.....	674
3. Water Rights.....	675
4. Water Quality.....	677
5. Fish and Wildlife Resources.....	677
6. Air Resources.....	679
B. <i>The Public Trust Doctrine in Our Federal System.....</i>	680
C. <i>Reconciling the Public Trust Doctrine With Other Key</i>	
<i>Legal Doctrines.....</i>	681
D. <i>Ascertaining the Ultimate Source of the Public Trust</i>	
<i>Doctrine.....</i>	684
III. PREVIEWING THIS VOLUME'S PUBLIC TRUST SCHOLARSHIP	686

* Copyright © 2012 Richard M. Frank. Professor of Environmental Practice and Director, California Environmental Law & Policy Center, UC Davis School of Law. The research assistance of Lynn F. Gatti ('12) is gratefully acknowledged. My sincere thanks to the editors of the UC Davis Law Review, and especially Errol Dauis ('11) and Barbara Borkowski ('11), for their leadership in organizing the March 2011 Symposium that formed the intellectual basis for this symposium issue, and to Samuel Carstensen ('12), the editor responsible for bringing this symposium issue to fruition. Special thanks to Dean Kevin Johnson for his intellectual and financial support, and to the Resources Legacy Fund, which provided a generous grant to help underwrite the expense of the 2011 Symposium and publication of this symposium issue. Finally, I extend my appreciation to the participants who attended last year's Symposium, who both by their number and enthusiasm demonstrated the continuing viability and intellectual force of the public trust doctrine.

For over four decades, the public trust doctrine has served as a foundational principle of modern environmental and natural resources law. This issue of the *UC Davis Law Review*, and the related, major symposium that drew a standing-room-only audience to King Hall in March 2011, demonstrate the continuing vitality of the public trust. The scholarship featured in these pages continues the UC Davis Law School's leadership role concerning the doctrine, examines its recent development, and poses key questions regarding its future course.

Much has been written about the public trust doctrine, and the articles in this volume explore many of its nuances and implications. Simply stated, however, the doctrine provides that certain natural resources are held by the government in a special status — in “trust” — for current and future generations. Government officials may neither alienate those resources into private ownership nor permit their injury or destruction. To the contrary, those officials have an affirmative, ongoing duty to safeguard the long-term preservation of those resources for the benefit of the general public.¹

I. THE ROAD TO THE PRESENT

Most environmental scholars cite two critically-important developments as the basis for converting the public trust from an arcane principle of Roman, Spanish and English property law into a cornerstone of modern environmental law. The first, of course, was Professor Joe Sax's seminal 1970 article that first identified and proposed the public trust doctrine as a key component of the then-new discipline of environmental law.² To state that Sax's article proved influential is a gross understatement: it is perhaps the most heavily-cited law review article — by courts and scholars alike — in over four decades of environmental law.

More importantly, Professor Sax's scholarship had a catalytic effect among courts and environmental policymakers throughout the country. Courts in numerous states relied on Sax's article to embrace the public trust doctrine within their respective jurisdictions. Illustrative is the California Supreme Court's decision a mere one year later, in *Marks v. Whitney*.³ In *Marks*, that court used a seemingly-

¹ See generally Richard Frank, “The Public Trust Doctrine,” in *California Environmental Law* (Matthew Bender 2011, at 1-2 *California Environmental Law & Land Use Practice*).

² Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³ *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

mundane property dispute between neighboring Tomales Bay neighbors to declare that public trust uses extend beyond the traditionally-stated trilogy of commerce, navigation and fishing, to encompass environmental values and protection:

There is a growing public recognition that one of the most important public trust uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.⁴

One year later, the New Jersey Supreme Court cited Professor Sax's 1970 article to similarly declare that the public trust doctrine may be relied upon to protect and foster recreational use of trust resources such as coastal beaches:

[I]n this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.⁵

And in a controversial 1972 decision, the Wisconsin Supreme Court expressly relied on Sax's article to hold that the public trust doctrine could be asserted to bar the filling of privately-owned wetlands, in order to preserve those wetlands in their natural condition.⁶

The second major development that brought the public trust to full flower as a bedrock principle of modern environmental law is one in which those of us affiliated with the UC Davis School of Law take special pride. In 1980, another nationally-renown environmental scholar, UC Davis Law Professor Harrison (Hap) Dunning, organized the first-ever conference devoted to the public trust doctrine and its role in modern environmental law. That two-day event was held at UC Davis in September 1980, and attracted some 650 attendees — among them, many of the country's top environmental scholars, natural resources management officials and environmental lawyers — to discuss and debate the public trust. The conference was entitled, "The

⁴ *Id.* at 380.

⁵ *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

⁶ *Just v. Marinette Cnty.*, 201 N.W. 2d 761, 768 (Wis. 1972).

Public Trust Doctrine in Modern Natural Resources Management: A Symposium.”

From that groundbreaking event came the 1980-81 symposium issue of the UC Davis Law Review, a collection of thoughtful articles that, like Joe Sax’s 1970 seminal Michigan law review article, would prove to have enormous influence on judicial development of the public trust doctrine.⁷

That was nowhere more true than in California. California appellate courts had not opined on the public trust doctrine for nearly a decade following the California Supreme Court’s 1971 *Marks v. Whitney* decision. But that changed in the wake of the 1980 UC Davis conference and the subsequent UC Davis Law Review symposium issue that memorialized the conference’s scholarship. In short order, the California Supreme Court decided four cases that would build on *Marks v. Whitney* and make California perhaps the most solicitous jurisdiction in the nation with respect to public trust principles.

In 1980, the California Supreme Court handed down *City of Berkeley v. Superior Court*,⁸ in which that court rejected a private landowner’s claim that nineteenth century legislative grants of tidelands necessarily extinguished the public’s trust interest in shoreline parcels along San Francisco Bay. The following year, the same court issued two important rulings that forcefully established the trust’s applicability to inland navigable lakes and rivers, including Lake Tahoe and Clear Lake.⁹ In these landmark decisions, the California Supreme Court cited and relied upon the scholarship published in the UC Davis Law Review’s public trust volume.

But it was in 1983 that the full influence of the public trust scholarship developed at UC Davis earlier in that decade became apparent. Two of the articles contained in the 1980-81 symposium issue had specifically — and presciently — focused on the trust’s potential applicability to water rights and stream flows.¹⁰ In 1983 the

⁷ Symposium, *The Public Trust Doctrine in Modern Natural Resources Law: A Symposium*, 14 UC DAVIS L. REV. 181, 181-496 (1980-81). Professors Sax and Dunning both spoke at the 1980 conference and wrote articles published in the 1980-81 issue, which to date remains the single largest selling volume in the 46-year history of the UC Davis Law Review.

⁸ *City of Berkeley v. Superior Court*, 606 P.2d 362 (Cal. 1980).

⁹ See *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981) (involving title to Clear Lake); *State v. Superior Court (Fogerty)*, 625 P.2d 256 (Cal. 1981) (Lake Tahoe).

¹⁰ Harrison C. Dunning, *The Significance of California’s Public Trust Easement for California Water Rights Law*, 14 UC DAVIS L. REV. 357 (1980-81); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 UC DAVIS L. REV. 233

California Supreme Court responded by issuing what was perhaps the nation's most important public trust decision in nearly a century — the iconic “Mono Lake” case.¹¹ In that decision, the Supreme Court held that the public trust applies to flowing waters — and water rights — just as it does to tide and submerged lands and the beds of inland navigable waters. Critically, the court's landmark opinion cited to the articles contained in the 1980-81 UC Davis symposium issue devoted to public trust principles on no less than *eight* separate occasions.¹²

At the same time, the intellectual force and impact of that scholarship was by no means limited to California. The courts of numerous other states similarly relied upon and cited the 1980-81 UC Davis Law Review volume devoted to trust principles in a series of decisions that developed the public trust doctrine in their own, respective jurisdictions.¹³

Fast forward three decades. Thirty years after publication of its influential collection of scholarly articles analyzing the public trust doctrine's relevance to modern natural resources law, the editors of the UC Davis Law Review wisely decided it was time to revisit the issue. How had the public trust developed over the intervening decades — in California, the United States and internationally? Equally important, what could government leaders, environmental lawyers and the academy learn from those developments, and what do they portend for the public trust doctrine's future course as a cornerstone of modern environmental law and policy?

Those questions formed the overarching themes of the UC Davis Law Review's 2011 Public Trust Symposium — and of the legal scholarship collected in this volume.

(1980-81). Those articles were no doubt influenced by the then-pending litigation brought by environmental organizations challenging the City of Los Angeles' diversion of streams feeding Mono Lake in the Eastern Sierras for municipal consumption in Southern California.

¹¹ Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

¹² *Id.* at 712, 718, 719, 720-21, 722, 727, 728, 729.

¹³ See generally *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984); *Sierra Club v. Block*, 622 F. Supp. 842 at 866 (D. Colo. 1985); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 512 (Miss. 1986); *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993); *Rettkowski v. State*, 858 P.2d 232, 243 (Wash. 1993); *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987).

II. ASSESSING PUBLIC TRUST DEVELOPMENTS OVER THE PAST THREE DECADES

As noted above, courts around the country have been busy over the past three decades, applying — and in some cases rejecting — the public trust doctrine in a variety of natural resource settings. In order to provide a further bit of context and foundation for the commentary that follows, I offer the following, brief survey of key public trust-related developments from throughout the nation.

Focusing on four particular, trust-related questions provides a useful set of ordering principles for this discussion:

- What natural resources are subject to the public trust, and to the obligations that doctrine imposes upon natural resource managers charged with the long-term preservation of those resources?
- To what degree are natural resources managed by the *federal* government — and federal regulators and managers themselves — subject to public trust protections and duties?
- How is the public trust to be reconciled with other important legal doctrines, such as state water rights systems and constitutional limitations on government’s use and regulation of property?
- What is the ultimate source of the public trust doctrine, and to what degree are legislatures, courts and others free to modify trust-related rules and government duties?

A. *What Natural Resources are Subject to the Public Trust?*

1. Inland Navigable Waterways

The most traditional application of the public trust doctrine has been to tidal and submerged lands, of the type adjudicated by the California Supreme Court in *City of Berkeley v. Superior Court*,¹⁴ discussed above. But various courts have similarly found the public

¹⁴ *City of Berkeley v. Superior Court*, 606 P.2d 362 (Cal. 1980); *see also* *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821). “Tidelands” are commonly defined as lands over which the tide ebbs and flows. AARON L. SHALOWITZ, 1 *SHORE AND SEA BOUNDARIES* 5 (1962). “Submerged lands” were historically defined as state-owned lands between the tidelands and the three-mile limit delineating the boundary between state and federally-owned offshore waters. *Id.* at 99, n. 41.

trust fully applicable to inland navigable waters.¹⁵ As noted previously, the California Supreme Court so held in two related cases decided in 1981: *State of California v. Superior Court (Lyon)*¹⁶ and *State of California v. Superior Court (Fogerty)*.¹⁷ Those cases specifically involved two of California's largest and most well-known navigable lakes: Clear Lake and Lake Tahoe. But the California Supreme Court expressly noted that its ruling would affect a far broader collection of the state's navigable lakes and rivers: "400 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water (the shorezone)."¹⁸

Over the past 30 years, a number of other states have similarly and explicitly applied the public trust to inland navigable lakes and rivers within their jurisdictions. In *Kootenai Environmental Alliance v. State Board of Land Commissioners*,¹⁹ for example, the Idaho Supreme Court confirmed the application of the public trust doctrine to the bed and banks of Lake Coeur d'Alene. The court there stressed the inherent limitation the trust placed on the ability of state land managers to grant lakeshore lease rights to private parties.²⁰

In *Lawrence v. Clark County*,²¹ the Nevada Supreme Court formally embraced the public trust as fully applicable to existing and former riverbeds in that jurisdiction. In *Lawrence*, the court concluded that public trust principles constrained the Nevada Legislature's power to

¹⁵ See, e.g., *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (bed of Lake Michigan along Chicago waterfront).

¹⁶ *State v. Superior Court (Lyon)*, 625 P.2d 239, 244-46 (Cal. 1981).

¹⁷ *State v. Superior Court (Fogerty)*, 625 P.2d 256, 259 (Cal. 1981).

¹⁸ *Id.* at 245. "Navigability," for purposes of establishing that the bed of an inland waterway constitutes state sovereign land for purposes of applying public trust principles, is a matter of federal law, and involves determining whether particular rivers or lakes were "used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *PPL Montana v. Montana*, 132 S. Ct. 1215, 1228 (2012); *Utah v. United States*, 403 U.S. 9, 10 (1970). Critically, navigability for this purpose is to be determined as of the date a particular state was admitted to the Union (in California, on September 9, 1850). *Id.*; see also *Lawrence v. Clark Cnty.*, 254 P.3d 606, 614 (Nev. 2011). For a general discussion of legal principles of navigability, see Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 UC DAVIS L. REV. 579 (1983); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975).

¹⁹ *Kootenai Env'tl Alliance, Inc. v. State Bd. of Land Comm'rs*, 671 P.2d 1085 (Idaho 1983).

²⁰ *Id.* at 1095.

²¹ *Lawrence*, 254 P.3d 606.

alienate trust lands — in that case, the now-dry bed and banks of a historic Colorado River channel.²²

Recent decisions from both Ohio and Michigan are in accord. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*²³ involved a title dispute between Ohio regulators, asserting title to the beds and banks of Lake Erie as sovereign trust lands, and private owners of upland, shoreline parcels. In resolving the boundary dispute in favor of the state, the Ohio Supreme Court confirmed that “the territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline. . .”²⁴ And in *Glass v. Goeckel*,²⁵ the Michigan Supreme Court reached the same conclusion in resolving a property dispute between adjacent private property owners along another of the Great Lakes, Lake Huron. In *Glass*, the court ruled that Michigan held a public trust interest in the bed and banks of Lake Huron up to the ordinary high water mark, and that shoreline landowners accordingly must afford their neighbor unfettered access along the Lake Huron shore below the high water mark.²⁶

While most cases involving public trust claims to the inland navigable waterways — like public trust litigation in general — are litigated in state courts, the federal judiciary is occasionally the forum where such cases are adjudicated. One such example from the recent past is *North Dakota v. Andrus*.²⁷ That case involved a title dispute between the State of North Dakota and the federal government over title to the bed of the Little Missouri River. Affirming the district court, the Eighth Circuit Court of Appeals held that the river was navigable for title purposes, and that the Little Missouri riverbed is therefore sovereign land owned by North Dakota in trust for its citizens.²⁸

²² *Id.* at 612.

²³ 955 N.E.2d 935 (Ohio 2011).

²⁴ *Id.* at 949.

²⁵ *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005).

²⁶ *Id.* at 74-75.

²⁷ *North Dakota v. Andrus*, 671 F.2d 271 (8th Cir. 1982), *cert. granted on other grounds sub nom.* *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1982).

²⁸ *Id.* at 277; *see also Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 795-96 (9th Cir. 1982) (finding that because Oregon's McKenzie River is navigable under federal law upon Oregon's admission to the Union in 1859, the bed of river therefore constitutes state sovereign trust lands); *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692 (1979) (ruling of DOI's Alaska Native Claims Appeal Board finding that Alaska's Kandik and Nation Rivers are navigable for title purposes and therefore held in trust by the State of Alaska).

2. Public Access

Several state courts have relied upon the public trust doctrine to advance public rights of access to waterways. No jurisdiction has been more assertive in this regard than New Jersey. In *Matthews v. Bay Head Improvement Assn.*,²⁹ the New Jersey Supreme Court held that the public trust protects the public's right of access to the seashore, and that this right of access extends across dry sand areas located between the water and the nearest public road. In effect, declared the court, members of the public have a public trust-based easement right to cross privately-owned, shoreline property to get to the ocean.³⁰

More recently, the New Jersey Supreme Court reaffirmed its *Matthews* precedent in *Raleigh Ave. Beach Assn. v. Atlantis Beach Club, Inc.*, holding that this public trust easement is in fact not limited to the right of passage along privately-owned dry sand areas, but also encompasses the public's right to sunbathe, picnic, etc., on those dry sand areas.³¹

Other state courts, while holding that public trust uses include a public right of access, have declined to go as far as New Jersey. Illustrative is the decision of the New Hampshire Supreme Court in *Opinion of the Justices*,³² in which that court took a more measured view of the trust's mandate of public access to shoreline areas. While the New Hampshire Supreme Court confirmed the public trust's incorporation of a public right of access, it expressly limited that right to tideland areas below the coastal ordinary high water mark. Extending access to dry sand areas landward of that boundary, opined the New Hampshire justices, would contravene upland owners' private property rights.³³

Most other jurisdictions have similarly refrained from adopting the expansive New Jersey rules of dry sand access under the public trust. Examples include Maine, where that state's Supreme Judicial Court held in 2011 that under public trust principles contained in Maine common law, the public has the right to walk across intertidal lands — but not dry sand areas — fronting privately owned shoreline lots for purposes of recreational activities such as scuba diving.³⁴

²⁹ *Matthews v. Bay Head Improvement Ass'n.*, 471 A.2d 355 (N.J. 1984).

³⁰ *Id.* at 323-24.

³¹ *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 119-20 (N.J. 2005).

³² *Opinion of the Justices*, 649 A.2d 604 (N.H. 1994).

³³ *Id.* 609-10 (responding to an opinion request from that state's legislature, which was considering adoption of the New Jersey "dry sand" rule by statute).

³⁴ *McGarvey v. Whittredge*, 28 A.3d 620, 636 (Me. 2011); *see also* *Lake Beulah*

3. Water Rights

Over the past 30 years, the most significant expansion of public trust principles has been in the context of the doctrine's application to water rights.

The California Supreme Court's landmark decision in *National Audubon Society v. Superior Court*³⁵ was not the first court ruling expressly applying the public trust doctrine to consumptive water rights. That distinction goes to North Dakota. In *United Plainsmen Assn. v. North Dakota State Water Conservation Commission*, the North Dakota Supreme Court held that the public trust doctrine requires state water officials charged with allocating water supplies to gage the effect of a water rights permit on existing and future statewide water requirements and, in appropriate circumstances, to devise water conservation plans.³⁶

Nevertheless, in the wake of *National Audubon*, a number of other states have had occasion to address the question of whether and to what extent water rights are subject to public trust-related obligations and potential restrictions. And it's fair to say that they've done so in a wide array of ways, with varying degrees of solicitude toward public trust principles.

Hawaii is the state that has applied — and extended — the *National Audubon* holding most broadly — at least judicially. In *In re Water Use Permit Applications for the Waiahole Ditch*, the Hawaii Supreme Court issued an expansive decision applying the public trust to that state's groundwater resources.³⁷ *Waiahole Ditch* is the first reported case from an American court to do so. Rejecting arguments from private water users that the public trust applies to surface waters but not groundwater, the Hawaii court observed, “the common law distinctions between ground and surface water developed without regard to the manner in which ‘both categories represent no more than

Mgmt. Dist. v. State Dep't of Natural Res., 799 N.W.2d 73, 83-84 (Wis. 2011) (“[T]he history and evolution of the public trust doctrine indicate a ‘trend to extend and protect the rights of the public to the recreational enjoyment of the navigable waters of the state.’” (quoting *Muench v. Pub. Serv. Comm'n*, 145 N.W. 816 (Wis. 1914)).

³⁵ *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

³⁶ *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457, 463 (N.D. 1976).

³⁷ 9 P.3d 409, 445-47 (Haw. 2000). For a detailed discussion of the *Waiahole Ditch* opinion, see Symposium, *Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine*, 14 U. HAW. L. REV. 21, 43-50 (2001) (containing remarks by Jan Stevens).

a single integrated source of water with each element dependent upon the other for its existence.’³⁸

The State of Vermont soon followed Hawaii’s lead, but not in the form of a court decision. Instead, the Vermont state *legislature* in 2008 adopted statutory amendments formally declaring that Vermont’s groundwater resources are impressed with public trust obligations.³⁹

In California, litigation is currently pending in which environmental and commercial fishing groups are attempting to obtain a court ruling that the public trust doctrine applies to that state’s groundwater resources as well — at least when groundwater has a demonstrated hydrologic connection to surface waters in the same region.⁴⁰

State legislatures have confirmed or expanded the trust’s applicability to water resources in other contexts as well. In 2009, as part of legislative reforms to address the ecosystem, water supply and flood safety problems confronting the Sacramento-San Joaquin Delta, the California Legislature adopted a new statute that provides in pertinent part, “the public trust shall be the foundation of state water management policy and [is] particularly important and applicable to the Delta.”⁴¹

In other states, however, legislative bodies have proved willing to countermand court decisions the legislative branch deems excessively solicitous of public trust claims. In Idaho, that state’s Supreme Court, relying on *National Audubon* and its own, earlier *Kootanai Environmental Alliance* decision applying the trust to the bed of Idaho’s largest lakebed, ruled that the public trust applied to Idaho’s consumptive water rights system as well.⁴² But no sooner was the ink dry on that judicial decision than the Idaho Legislature enacted a statute expressly repealing the trust’s applicability to Idaho water rights.⁴³ This legislative nullification, in turn, sparked a lively debate in the academic community over whether a state legislature has the power to nullify public trust mandates — i.e., is the trust purely a creature of state common law subject to legislative modification, or does it have constitutional or quasi-constitutional status that is

³⁸ *In re Water Use Permit Applications*, 9 P.3d at 447 (quoting *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 73 (Haw. 1982)).

³⁹ See VT. STAT. ANN. tit. 10, §§ 1390(5), 1418(i) (2010).

⁴⁰ *Envtl Law Found. v. State Water Res. Control Bd.*, Sacramento County Superior Court No. 34-2010-80000583 (2010) (involving the Scott River and associated groundwater basins in Siskiyou County, California).

⁴¹ CAL. WATER CODE § 85023.

⁴² *Idaho Conservation League v. State*, 911 P.2d 748 (Idaho 1995).

⁴³ IDAHO CODE §§ 58-1201 to 58-1203.

immune from legislative efforts to circumscribe or eliminate the doctrine's applicability to certain resources?⁴⁴

4. Water Quality

Far less developed is the question of whether and to what extent the public trust doctrine protects water quality, as opposed to consumptive water rights. At least one state — California — has addressed this question. In 1986, shortly after the California Supreme Court's *National Audubon* decision, the California Court of Appeal had occasion to explore the question of whether and to what extent water users with vested water rights bear any responsibility for water quality problems to state waterways occasioned by upstream water diversions. In *United States v. State Water Resources Control Board*,⁴⁵ also known colloquially as the "Racanelli decision" for the jurist who wrote the opinion, that court answered the question in the affirmative. Rejecting the arguments of the United States and other diverters to the contrary, the court relied in significant part on the California Supreme Court's *National Audubon* decision to conclude that the public trust doctrine allows state water regulators to modify previously-issued water rights in permits in order to protect the water quality values of the Sacramento-San Joaquin Delta region.⁴⁶

This explicit extension of public trust protections to water quality seems both logical and necessary. As no less an authority than the U.S. Supreme Court has recently observed, when it comes to both ecosystem management and natural resources law, water rights and water quality are inextricably related.⁴⁷

5. Fish and Wildlife Resources

While the public trust doctrine has developed dramatically in the water context, the same cannot be said of the doctrine's applicability to fish and wildlife resources. This is surprising, inasmuch as fish and wildlife are — along with tidal and submerged lands — the natural

⁴⁴ See, e.g., Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 *ECOLOGY L. Q.* 461 (1997). The question of the legal basis of the public trust doctrine is discussed *infra*.

⁴⁵ *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986).

⁴⁶ *Id.* at 200-01.

⁴⁷ *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 720-23 (1994).

resources most traditionally associated with the public trust doctrine. In the nineteenth century, the U.S. Supreme Court followed established English common law to declare that the states “own” fish and game within their borders on behalf of their citizens.⁴⁸ California has consistently adopted the same view,⁴⁹ as have several other states around the nation.⁵⁰

But there has been precious little development of public trust principles in the fish and wildlife context over the past three decades. To the contrary, the reported decisions that do exist seem reluctant to apply public trust principles vigorously to protect fish and wildlife resources. Again, the recent California experience is illustrative.

To be sure, in 1990 a California Court of Appeal relied on the *National Audubon* precedent and two previously-obscure provisions of the state Fish and Game Code⁵¹ to mandate sufficient releases from state dams to re-establish and maintain state fisheries.⁵² In doing so, that court expressly rejected water users’ contention that their vested water rights trumped the fisheries protections under common law and state statute.⁵³

More recent public trust decisions in the fish and wildlife context have been less enamored of the doctrine, however. In *Environmental Protection Information Center (EPIC) v. California Dep’t of Forestry and Fire Protection*, the California Supreme Court rejected a claim that the public trust doctrine proscribed a state-industry agreement over future logging in the iconic Headwaters Forest in northwestern California that allegedly threatened several listed wildlife species and therefore violated public trust principles.⁵⁴ The court instead concluded that when it comes to California’s fish and wildlife resources, any public trust-based protections are codified in state statute, leaving little or no room for judicial amplification.⁵⁵

⁴⁸ *Geer v. Connecticut*, 161 U.S. 519, 529 (1896). *But see*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

⁴⁹ *Ex parte Maier*, 37 P. 402, 404 (Cal. 1894); *Betchart v. Dep’t of Fish & Game*, 205 Cal. Rptr. 135, 135-36 (Cal. Ct. App. 1984); *see also* CAL. FISH & GAME CODE § 1801(f) (2012).

⁵⁰ E.g., *Owichek v. State Guide Licensing Bd.*, 763 P.2d 488, 495-496 (Alaska 1988); *Wade v. Kraemer*, 459 N.E.2d 1025, 1027-29 (Ill. App. Ct. 1984); *Commonwealth v. Alger*, 61 Mass. 53, 98 (1851).

⁵¹ CAL. FISH & GAME CODE §§ 5937, 5946 (2012).

⁵² *Cal. Trout, Inc. v. Superior Court*, 266 Cal. Rptr. 788, 801-02 (1990).

⁵³ *Id.* at 795.

⁵⁴ *Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Protec.*, 187 P.3d 888 (2008).

⁵⁵ *Id.* at 926.

Contemporaneously, another California appellate court rejected a public trust-based claim that wind farms operated by private parties in the Altamont Pass region were having a deleterious effect on various bird species and should therefore be enjoined.⁵⁶ Consistent with the reasoning in the California Supreme Court's *EPIC* decision, the *Center for Biological Diversity* court held that the environmental group bringing the suit should have focused its attention (and litigation efforts) on state fish and game regulators who, in the court's view, have principal public trust-based responsibility for protecting the wildlife resources in question.

In sum, public trust principles have remained relatively static over the past 30 years with respect to the doctrine's applicability to fish and wildlife resources.

6. Air Resources

In many ways, our air resources would seem the natural resource most susceptible of treatment as a foundational public trust resource. After all, it is by its physical nature incapable of private "ownership," and science has demonstrated how the private degradation of air quality can have demonstrable, harmful impacts on public health and aesthetic values.

With the recent legal and public attention being given to climate change concerns, there has developed a heightened focus on our atmosphere as a public resource. According to climate scientists, private (and public) emissions of greenhouse gases pose a grave, long-term danger to the general public health and welfare.

Accordingly, it is somewhat surprising that — at least until quite recently — there has been precious little development of public trust principles in the context of air quality and air resources. To be sure, the constitutions or statutes of some states provide at least nominal, public trust-based solicitude for atmospheric resources.⁵⁷

⁵⁶ *Ctr. for Biological Diversity v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 606-07 (Cal. Ct. App. 2008).

⁵⁷ See, e.g., Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. § 691-1202(1) (West 1989) (extending the public trust, via statute, to authorize legal actions "for the protection of the *air*, water and other natural resources *and the public trust therein* from pollution, impairment or destruction." (emphasis added)); see also, *Payne v. Kassab*, 312 A.2d 86, 93 (Pa. Commw. Ct. 1973) (relying on both the public trust doctrine and the Pennsylvania Constitution to require maintenance of "clean air . . . and [] the preservation of the natural, scenic, historic and esthetic values of the environment.").

There is a renewed focus on the trust doctrine's potential applicability to atmospheric resources. Recently, some legal scholars have partnered with environmental advocates to press public trust claims in a series of lawsuits around the country that seek to limit greenhouse gas emissions from a variety of sources, thereby addressing climate change concerns.⁵⁸

B. *The Public Trust Doctrine in Our Federal System*

Another currently-unsettled aspect of public trust jurisprudence is how the public trust doctrine applies in our federal system of government. That is, what effect does the public trust doctrine have on natural resources owned or managed by the federal — as opposed to state — government? And what “trustee”-type responsibilities, if any, have the federal agencies and officials charged with managing those federal resources?

The answers to these questions have substantial, practical significance, particularly in the western United States. In California, for example, nearly 50 percent of the state's land area is federally-owned. In Nevada, federal lands encompass approximately 90 percent of the state.⁵⁹

A handful of lower federal courts decisions appear to apply the public trust to federal lands.⁶⁰ More recent cases, however, have refused to apply the public trust doctrine to federal lands and officials.⁶¹ At least one quite recent decision concludes that the public

⁵⁸ See, e.g., Mary Wood, *Atmospheric Trust Litigation Around the World*, in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (K. Cognhill et al. eds., Ashgate Publishing 2012), available at <http://law.uoregon.edu/assets/facultydocs/mwood/atmospherictrustlitigation.pdf>; Mary Wood, *A Theory of Atmospheric Trust Litigation in CLIMATE CHANGE: A READER* 1018-40 (Carolina Academic Press 2011); Chris Evans, *Atmospheric Trust Litigation*, WEST COAST ENVTL. LAW (June 14, 2011), available at <http://wcel.org/resources/environmental-law-alert/atmospheric-trust-litigation> (discussing litigation filed by environmental activists in 2011 against all 50 states and the federal government for their failure to reduce greenhouse gas emissions, a deficiency plaintiffs claim violates public trust principles).

⁵⁹ 2003 OFFICE OF GOVERNMENTWIDE POLICY FED. REAL PROP. PROFILE 17 tbl. 16.

⁶⁰ See, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122-125 (D. Mass. 1981) (discussing how federal condemnation of state tidelands leaves property impressed with public trust attributes); *Sierra Club v. Dep't of the Interior*, 398 F. Supp. 284 (N.D. 1975) (discussing how challenge to National Park Service's alleged failure to protect the Redwoods National Park from damage attributable to logging on adjacent, private lands); *Sierra Club v. Dep't of the Interior*, 376 F. Supp. 90, 95-96 (N.D. Cal. 1974).

⁶¹ *Dist. of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1081-86 (D.C. Cir. 1984) (declining to consider whether public trust doctrine authorizes federal owner of

trust doctrine does not impose independently-enforceable mandates upon federal agencies and officials with respect to their administration of natural resource obligations.⁶²

Accordingly, little progress has occurred over the past 30 years in making federal resources and officers subject to the same, public-trust-based obligations that apply to state and local governments in most American jurisdictions.

C. Reconciling the Public Trust Doctrine With Other Key Legal Doctrines

Standing in sharp contrast to the relative quiescence of the public trust's applicability to federal resources and agencies is the flurry of judicial activity in recent years over the doctrine's relationship to other, key legal principles. How public trust principles are reconciled and harmonized with those other overarching doctrines promises to remain a fertile ground of judicial inquiry in the future.

In some instances, the tension arises from parallel provisions of state law. California provides a useful illustration: public trust principles are often invoked in tandem with other state laws, be they statutory or constitutional provisions. For example, Article X, section 2 of the California Constitution provides a constitutional proscription against the waste and unreasonable use or diversion of state waters. Some advocates, water users and state regulators originally argued that the public trust doctrine was fully subsumed in that state constitutional provision, at least insofar as it affected private water rights.⁶³ However, the California Supreme Court expressly rejected that argument in its landmark *National Audubon* decision.⁶⁴

Other decisions have explored statutory provisions such as California Fish and Game Code sections 5937 and 5946, which mandate sufficient water releases from dams to maintain state fisheries.⁶⁵ Do such laws represent legislative codification of public

sovereign riverbed to recover its costs associated with airline disaster); *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980) (expressly rejecting public trust doctrine as basis for protecting federal reserved water rights, in favor of express statutory provisions).

⁶² *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1231-32 (S.D. Cal. 2011).

⁶³ See, e.g., Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982).

⁶⁴ *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983).

⁶⁵ See, e.g., *Cal. Trout, Inc. v. Superior Court*, 266 Cal. Rptr. 788 (1990). A comprehensive treatment of section 5397's relationship to the public trust doctrine

trust principles, or do they have independent and heightened legal effect?

But the most active context of this “reconciliation” debate over the past three decades has been the public trust doctrine’s uneasy relationship with the so-called Takings Clause of the Fifth Amendment to the U.S. Constitution. That provision prohibits government’s “taking” of private property for public use without payment of just compensation. Those requirements have been made applicable to the states under the Fourteenth Amendment.⁶⁶ A detailed explication of the takings doctrine is obviously beyond the scope of this article.⁶⁷

In recent years the intersection of the public trust doctrine and Takings Clause principles has manifested itself in two distinct contexts. First, in a number of cases private landowners have raised the Takings Clause in an effort to defeat public trust-based claims advanced by government and environmental interests. For the most part, those constitutional claims have been unsuccessful.⁶⁸ At least one state court decision suggests the contrary result is possible, however.⁶⁹

The second and distinct context arises from the U.S. Supreme Court’s landmark regulatory takings decision in *Lucas v. South Carolina Coastal Council*.⁷⁰ In that case, the Court ruled that even where government regulation has the effect of eliminating all economic value or use of private property, there is no constitutional taking when the challenged regulation reflects a longstanding

can be found elsewhere in this volume. See Karrigan S. Bork et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 UC DAVIS L. REV. 809, 809-13 (2012).

⁶⁶ *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

⁶⁷ For a comprehensive treatment of takings principles, see ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (Island Press 1999).

⁶⁸ See, e.g., *State v. Superior Court (Lyon)*, 625 P.2d 239, 252-53 (Cal. 1981) (no unconstitutional divestment of private property in light of fact that public trust easement was inherently reserved by sovereign and never passed into private ownership); *City of Berkeley v. Superior Court*, 606 P.2d 362, 372 (Cal. 1980) (“We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the [statute in question] will . . . hold it subject to the public trust”); *Just v. Marinette Cnty.*, N.W.2d 761, 771 (1972); accord *Nat’l Audubon Soc’y*, 658 P.2d at 723-24 (reaffirming *City of Berkeley*).

⁶⁹ *Orion Corp. v. State*, 747 P.2d 1062, 1073 (1987).

⁷⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

“background principle of the State’s law of property” that traditionally restrains private exploitation of property.⁷¹

Following *Lucas*, several courts have explored the question of the extent to which the public trust doctrine represents just such a “background principle” of state property law that immunizes from taking challenge government regulations that have a deleterious effect on private property use and/or value. In *Esplanade Properties v. City of Seattle*,⁷² the U.S. Court of Appeals for the Ninth Circuit addressed this issue. In that case, a private developer, relying on *Lucas*, claimed that the city’s denial of a permit to develop tidelands along Puget Sound effected an unconstitutional regulatory takings if its property. The Ninth Circuit rejected that claim, concluding that the public trust doctrine constituted a background principle of Washington state law that imposed an inherent limitation on the company’s “right” to develop its tidelands parcel.⁷³

A Rhode Island court came to a similar conclusion in *Palazzolo v. State of Rhode Island*,⁷⁴ a case in which a landowner sued state regulators who had denied his application for a permit to develop coastal wetlands. The *Palazzolo* case has a long history, including a threshold decision from the U.S. Supreme Court on the Takings Clause question.⁷⁵ On remand from the Supreme Court, the Rhode Island state court addressed the question of whether that state’s public trust doctrine represented a background principle of state law sufficient to immunize state regulators from takings liability. The court answered that question in the affirmative.⁷⁶

The same issue is currently being litigated in the prominent *Casitas Municipal Water District v. United States* case. There a local water district is challenging federal mandates that required the district to install a passageway on the Ventura River so as to permit migration of fish species protected under the federal Endangered Species Act, and to leave sufficient water in the river to permit fish migration patterns. The district claimed such mandates constituted a compensable taking of their private property interests in the water resources involved. The United States, assisted by the State of California, argued that California’s public trust doctrine operates as an inherent limit on the

⁷¹ *Id.* at 1029-30; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

⁷² *Esplanade Props. v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002).

⁷³ *Id.* at 985.

⁷⁴ No. WM 88-0297, 2005 WL 1645974 (R.I. Super. 2005).

⁷⁵ See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁷⁶ *Palazzolo*, 2005 WL 1645974, at *6-7.

district's authority to divert water from the river to the detriment on migrating fish species. In a series of decisions, the U.S. Court of Appeals for the Federal Circuit has addressed this issue.⁷⁷

Another example of the intersection between the public trust doctrine and federal constitutional principles involves the Commerce Clause of the U.S. Constitution.⁷⁸ In several cases, it has been argued that federal authority to regulate and promote interstate commerce limits states' exercise of authority under the public trust doctrine. Such claims have met with mixed results in the courts.⁷⁹

The relationship between the public trust doctrine and other laws — and especially the trust's relationship to distinct constitutional principles — is likely to continue to generate substantial controversy and litigation in the future.

D. *Ascertaining the Ultimate Source of the Public Trust Doctrine*

One final, unsettled issue of public trust law is, in many ways, the most consequential: what is the ultimate legal source of the public trust doctrine?

Certain aspects of this issue are well-resolved. The U.S. Supreme Court's landmark 1892 decision in *Illinois Central Railroad Co. v. Illinois*⁸⁰ remains to this day one of most influential public trust decisions in American legal history. In that case, the Supreme Court struck down as violative of trust principles the Illinois Legislature's attempted sale of submerged lands along the Chicago waterfront to a private corporation.⁸¹ Despite some initial confusion, subsequent U.S. Supreme Court decisions confirm that *Illinois Central* constituted a judicial explication of *state*, rather than federal, law principles, and that the public trust is neither a creature nor a component of federal law.⁸²

⁷⁷ See *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329 (Fed. Cir. 2009); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008); *Casitas Mun. Water Dist. v. United States*, 2011 WL 6017935 (Fed. Cl. 2011).

⁷⁸ U.S. CONST. art. I, § 8, cl. 3.

⁷⁹ Compare *W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1344-45 (9th Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 81 (1985) (holding that state regulations computing rent for leasing sovereign tide and submerged lands based on volume of oil passing over leased property violates Commerce Clause), with *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057-1058 (9th Cir. 1987) (holding that municipal franchise fee for pipeline underlying city-controlled lands does not violate Commerce Clause).

⁸⁰ *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

⁸¹ *Id.* at 461-63.

⁸² *Appleby v. New York*, 271 U.S. 364, 395 n.13 (1926); *PPL Mont. v. Montana*,

Accordingly, it is well-settled that environmental lawyers, judges, policymakers and scholars must look to *state* law to determine the source and scope of public trust principles. But that begs the question: what *form* of state law? Is the public trust founded on state constitutional principles? State statutes? Or is it simply a creature of judicially-created common law principles? Alternatively, is the public trust an inherent and immutable component of state sovereignty?

This inquiry represents no mere intellectual exercise. To the contrary, the answer to that question plays an enormous role in determining the ultimate influence and scope of the public trust doctrine. If the public trust is simply a creature of state common law, it may be circumscribed by judicial decisions and nullified altogether by state legislative action. Similarly, if trust principles can only be enunciated in the form of statutes enacted by state legislatures, the role of the courts is greatly constrained.

Scholars have debated this foundational principle of public trust doctrine for decades. Among the most influential sources on the topic is, of course, Professor Joe Sax.⁸³ Another particularly authoritative voice is University of Colorado Professor Charles Wilkinson.⁸⁴

State courts around the country have characterized the source of the public trust doctrine within their respective jurisdictions in varying ways. Nevada and Pennsylvania, for example, cite their respective state constitutions as the principal basis for public trust-related principles.⁸⁵ Other states view the doctrine as manifested primarily through state legislation.⁸⁶ Still other jurisdictions trace trust principles as arising “from the inherent limitations on the state’s sovereign power, as recognized in *Illinois Central*. . . .”⁸⁷

132 S.Ct. 1215, 1227-28 (2012); *see also* *State v. Superior Court (Lyon)*, 625 P.2d 239, 244-45 (Cal. 1981). Some scholars, however, hold to the view that the public trust derives from federal law and, thus, is binding on all the states. Charles Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. LAW 425, 453-55 (1989).

⁸³ Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. LAW 473 (1989); Joseph L. Sax, *supra* note 2; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

⁸⁴ Wilkinson, *supra* note 83.

⁸⁵ *Lawrence v. Clark Cnty.*, 254 P.3d 606, 612-613 (Nev. 2011); *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

⁸⁶ *In re Omya Solid Waste Facility Final Certification*, No. 96-6-10, slip op. at 7 (Vt. Super. 2011), *available at* <http://www.vermontjudiciary.org/gtc/Environmental/ENVCRT%20Opinions/10-096c.OmyaSWCertif.sjo.pdf>.

⁸⁷ *Lawrence v. Clark Cnty.*, 254 P.3d 606, 613 (Nev. 2011); *see also In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409, 432 (Haw. 2000) (“[H]istory and precedent have established the public trust as an inherent attribute of

I have previously argued that, in California, the public trust doctrine is founded on the state constitution, statutes and common law, and that the trust represents a fundamental, inherent attribute of state sovereignty.⁸⁸ The same conclusion can logically be reached with respect to numerous other state jurisdictions around the nation.

The long-term viability of the public trust doctrine as a foundational principle of modern natural resources law will hinge, to a considerable degree, on how courts throughout the country view the jurisprudential source of trust principles. To the extent it is viewed as a core attribute of state sovereignty, founded in state constitutional law, or both, the more likely it will be able to withstand future efforts to limit or eviscerate public trust principles in various natural resource contexts.

III. PREVIEWING THIS VOLUME'S PUBLIC TRUST SCHOLARSHIP

Contained in the pages that follow is a series of outstanding articles analyzing various aspects and permutations of current public trust law and policy.

The volume begins with a fascinating, global treatment by Lewis and Clark Law School Professor Michael Blumm and one of his students, Rachel Guthrie. They examine how the public trust has developed in the international community in recent decades.⁸⁹ Professor Blumm and Ms. Guthrie explain how, over the past 20 years, several nations in diverse parts of the world have embraced the public trust doctrine as fundamental to their jurisprudence. Unlike the U.S. experience — where trust principles have evolved incrementally on a subnational, state-by-state basis, and grounded significantly in common law — other nations have made the public trust part of their constitutions, statutory systems and natural law. Blumm and Guthrie conclude that in countries as diverse as India, South Africa, Pakistan, Kenya, Brazil and Canada, the public trust has more fully achieved the potential original envisioned by Professor Sax than it has here in the United States.

sovereign authority”); Jan Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 UC DAVIS L. REV. 195, 196 (1980) (summarizing jurisprudence “in the form of declarations that the public trust is inalienable as an attribute of sovereignty no more capable of conveyance than the police power itself”).

⁸⁸ See Richard Frank, *The Public Trust Doctrine*, in CALIFORNIA ENVIRONMENTAL LAW ch. 2, § 2.04 (Matthew Bender 2011).

⁸⁹ Michael C. Blumm & R.D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 UC DAVIS L. REV. 741, 745-46 (2012).

In recent years, and as noted above, the public trust has been repeatedly invoked by government agencies as a defense against claims by private property owners that government regulation has effected an unconstitutional — and compensable — “taking” of their property in violation of the Fifth Amendment to the U.S. Constitution. Specifically, those government defendants argue that the trust is a fundamental, “background principle” of state law that necessarily limits the exercise of private property rights.⁹⁰ Professor John Echeverria of the Vermont Law School, one of the nation’s foremost experts on private property rights and the Takings Clause, examines this phenomenon, surveys the relevant case law, and analyzes how the “public trust defense” to regulatory takings claims has fared in recent litigation.⁹¹ Professor Echeverria explains that the invocation of public trust principles in this context has proven especially controversial in the context of private water rights that are restricted by government regulators who curtail water deliveries in order to further the objectives of the federal Endangered Species Act.

Brooklyn Law School Professor William Araiza’s fascinating article approaches the public trust doctrine from an entirely different perspective: he posits that the trust should perhaps be viewed prospectively — and at least in some natural resource contexts — not as a freestanding, legally-binding legal principle but, rather, as a canon of judicial construction.⁹² According to Professor Araiza, the protected status of public trust values, and government’s obligation to protect those values, would take the form of a background principle against which positive legislation and administrative actions would be construed and reviewed. Araiza takes the view that this proposed version of the trust would and should lack independent legal effect. So understood, he posits, the doctrine would harmonize the “intuitive attractiveness” of public trust principles with critics’ understandable concerns about judicial authority and competence in overseeing natural resources decision-making.

A distinguished group of scientists and lawyers are responsible for the next article in this issue, one that examines an important *legislative* articulation of public trust principles: California Fish and Game Code § 5937.⁹³ Dr. Karrigan Bork, who holds joint doctorate degrees in law

⁹⁰ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

⁹¹ John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 UC DAVIS L. REV. 931, 933-34 (2012).

⁹² William D. Araiza, *The Public Trust Doctrine as Interpretive Canon*, 45 UC DAVIS L. REV. 693, 697 (2012).

⁹³ Karrigan S. Bork et al., *The Rebirth of California Fish & Game Code Section 5937*:

and ecology, joins with UC Davis Professor of Fish and Conservation Biology Peter Moyle, biologist Jacob Katz, and environmental attorney and local government leader Joseph Krovoza to examine that statute, which has been in place for nearly a century. Section 5937 provides that owners and operators of California dams must allow sufficient instream flows to permit migrating fish species to travel over, around or through any such dam. Despite the law's seemingly-clear mandate, the authors observe that it has not been rigorously enforced by California wildlife officials over the years. The resulting, deleterious effect on California fish populations, they maintain, has been profound. The authors argue for more robust enforcement of § 5937's "minimum flow" requirements as necessary to fulfill the statute's promise to preserve a key, embattled public trust resource: California's fisheries.

Georgetown University Law Center Professor Peter Byrne continues the discussion of the intersection of the public trust doctrine and Takings Clause jurisprudence begun by Vermont Law School's John Echeverria earlier in this volume. Professor Byrne argues that in the future the public trust should provide a principled and effective basis to overcome regulatory takings challenges to environmental regulation.⁹⁴ He writes that the doctrine constitutionally supports reasonable legislative or regulatory limits on the use of private property that protect the public interest in maintaining or restoring a healthy environment. Focusing on such legislative and regulatory efforts, Byrne asserts, addresses the public trust doctrine's "problematic reliance on judicial activism" by employing the doctrine to sustain environmental legislation and regulation against judicial hostility.

Hastings College of the Law Professor Brian Gray has for many years been among the nation's most astute commentators on the subjects of water rights, the public trust and natural resources law. That reputation is further cemented by Professor Gray's thoughtful article on the long-term legacy and impact of the California Supreme Court's 1983 *National Audubon* decision⁹⁵ on California's water rights systems.⁹⁶ Professor Gray's cogent article concludes that the full potential of *National Audubon* has not been fulfilled, and that the water

Water for Fish, 45 UC DAVIS L. REV. 809, 813-16 (2012).

⁹⁴ J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 UC DAVIS L. REV. 915, 916 (2012).

⁹⁵ *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

⁹⁶ Brian E. Gray, *Ensuring the Public Trust*, 45 UC DAVIS L. REV. 973, 973-74 (2012).

planning and allocation decisions of the past three decades have come up substantially short. Gray's thesis is that the public trust doctrine and *National Audubon* mandate creation of an "ecological baseline" to protect California's remaining fish species and the aquatic ecosystems upon which they depend. He argues that state water planning, allocation and water rights enforcement decision-making must be reformed to ensure that result.

Minnesota Law School Professor Alexandra Klass' article thoughtfully explores the previously-overlooked relationship between the public trust doctrine and current efforts to site large-scale wind and solar projects on both public and private lands in the U.S.⁹⁷ She notes that both the proponents and opponents of such renewable energy projects have relied upon public trust theories to advance their respective positions. That is understandable because, unlike many conventional economic development projects, renewable energy projects are, in a sense, infused with their own public trust values. Klass, a nationally-renown public trust scholar, suggests ways in which existing statutes and new, proposed renewable energy legislation can build on public trust principles to encourage renewable energy development without compromising competing public trust values.

My UC Davis Law School colleague, Al Lin, has contributed a typically-insightful article comparing the public trust doctrine and public nuisance law as tools of modern environmental advocacy and policy.⁹⁸ Despite the dominance of statutes and regulations in current environmental law, both nuisance law and the public trust have in recent years played important roles in environmental litigation. Professor Lin charts the parallel developments of the two doctrines in recent years, noting that they "share an underlying goal of protecting communal interests in the environment and natural resources." But he also notes some key differences between these venerable doctrines, and notes how those differences are relevant as they are applied in the future to such environmental challenges as climate change, biodiversity protection and increased scarcity of water supplies.

University of Maine Law Professor Dave Owen, like Professor Brian Gray, focuses his attention on the modern legacy of the California Supreme Court's famous "Mono Lake" decision: *National Audubon*

⁹⁷ Alexandra G. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 UC DAVIS L. REV. 1021, 1023-26 (2012).

⁹⁸ Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 UC DAVIS L. REV. 1075, 1077-78 (2012).

Society v. Superior Court.⁹⁹ Professor Owen's article deconstructs that ruling, widely viewed as a seminal judicial treatment of public trust principles and, indeed, one of the classic decisions in modern American environmental law.¹⁰⁰ However, relying on documentary evidence from subsequent California judicial and administrative agency decision-making, Owen concludes that there is perhaps less to *National Audubon's* legacy than meets the eye. He observes that subsequent court decisions have interpreted and applied that precedent incrementally and modestly. By contrast, the impact of *National Audubon* has been greater at the *administrative* level, utilized by water rights and wildlife managers. Although Owen concludes that such an integration of public trust principles with administrative environmental law is a welcome development, he offers several reforms that would further enhance the role of the public trust doctrine in the administrative law setting.

This symposium volume concludes with reflections by one of my personal heroes, role models and mentors: California Court of Appeal Associate Justice Ronald Robie. Justice Robie is one of California's leading water rights authorities and an environmental scholar in his own right: before taking the bench, he served with distinction both as a member of California's State Water Resources Control Board and as Director of the California Department of Water Resources. As a sitting appellate judge, he has for many years found the time to teach environmental law and water law at the McGeorge School of Law. Justice Robie's article analyzes the use of the public trust doctrine in post-*National Audubon* water resources decision-making.¹⁰¹ He provocatively asks the question: is judicial intervention the best way to effectuate and protect public trust values in California's water resources? Robie concludes that while courts provide a necessary forum for protecting broad public trust values, the administrative arena — and, most prominently, California's State Water Resources Control Board — “remains the front line in the eternal struggle to balance the public's insatiable appetite for water in California with the equally important interest in protecting the nonconsumptive uses embodied in the public trust.”¹⁰²

⁹⁹ 658 P.2d 709 (1983).

¹⁰⁰ D. Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 UC DAVIS L. REV. 1099, 1101-03 (2012).

¹⁰¹ Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View From the Bench*, 45 UC DAVIS L. REV. 1155, 1156-57 (2012).

¹⁰² See also, *State Water Resources Control Board Cases*, 39 Cal. Rptr. 3d 189, 221-

Three decades ago, the UC Davis Law Review published a groundbreaking, symposium issue that would prove extraordinarily influential in the subsequent development of the public trust doctrine in California, nationally and around the globe. The impressive scholarship collected in this 2012 volume serves as a most worthy successor to that earlier achievement. My earnest hope and confident expectation are that the insights, legal analysis and policy recommendations contained in this volume will inform the development of the public trust doctrine over the next 30 years, and beyond.

23 (2006), in which Justice Robie (writing for the California Court of Appeal) makes the same, key point about the ultimate limits of judicial intervention when it comes to application of public trust principles in addressing particular natural resource conflicts.